**BR-110292**

Claimant, a citizen of Cape Verde, was permanently residing under color of law (PRUCOL) during the base period within the meaning of G.L. c. 151A, sec. 25(h), and was able and available for work during the benefit year under G.L. c. 151A, sec. 24(b). The documentary evidence established that he entered the country legally, held conditional residency status, was granted employment authorization and extensions of such authorization, was in regular contact with USCIS, and was ultimately granted lawful permanent resident status retroactively.



# BOARD OF REVIEW DECISION

## Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits to the claimant following his separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his employer on February 7, 2009. He filed a claim for unemployment benefits with the DUA on February 17, 2009, and was originally approved. However, on April 7, 2009, the DUA redetermined that the claimant was ineligible for benefits and was overpaid in the amount of $443.00 for benefits paid during the week ending February 28, 2009. The overpayment was subject to a 12% annual percentage rate interest charged on the unpaid balance due to misrepresentation of facts under G.L. c. 151A, § 69(a). The claimant appealed to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed in part and reversed in part in a decision rendered on June 4, 2010. The review examiner affirmed the agency's denial of benefits with an overpayment of $443.00 but found the overpayment was based upon error without fraudulent intent and reversed the interest charges.

Benefits were denied after the review examiner determined that the claimant was not authorized to work during the base period, as required under G.L. c. 151A, § 25(h). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to make additional findings of fact. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, who did not have a work authorization document during his base period or benefit year, ought nevertheless to be deemed to have been so authorized in light of evidence that he was a permanent resident under color of law (PRUCOL) throughout his base period and obtained a Removal of Conditions of Residence during his benefit year.

# Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. On February 28, 1983, the claimant was born in Cape Verde.

2. The claimant came to the United States on an American visa in March 2004.

3. The claimant worked for his most recent employer until February 2009.

4. The claimant's employment authorization card lapsed 2007, and he was given an authorization stamp in his passport allowing a six-month extension on his employment authorization, valid from July 12, 2007 through January 11, 2008.

5. In December 2008, the claimant was notified by the federal government that he needed to make an appointment with the local federal office to receive a passport stamp to extend his employment authorization.

6. From that time, the claimant and his attorneys endeavored to complete the necessary requirements and paperwork to extend the claimant's employment authorization, initially without success. It is unknown what specific action was taken by the claimant or by attorneys on his behalf.

7. On February 17, 2009, the claimant filed a claim for benefits effective on February 15, 2009. The claimant reported to the Division of Unemployment Assistance ("Division") that he is not a United States citizen.

8. The Primary Base Period of the claimant's claim is from January 1, 2008 until December 31, 2008.

9. The Alternate Base Period of the claimant's claim is from April 1, 2008 until February 14, 2009.

10. For the week ending February 28, 2009, the claimant was paid unemployment insurance benefits in the amount of $418.00, plus a $25.00 dependency allowance. The claimant was paid a total of $443.00 in benefits for the above-mentioned week.

11. On April 7, 2009, the Division mailed the claimant a Notice of Redetermination and Overpayment ("Notice") under Section 71 of the Law, indicating that in accordance with the provisions of Section 25(h) of the Law, the claimant was disqualified from receiving benefits.

12. The Notice further indicated that as a result, the claimant received benefits to which he was not entitled for the week ending February 28, 2009.

13. The Notice stated that the claimant was responsible for returning to the unemployment fund, benefits payments in the amount of $443.00.

14. The Notice also stated that the overpayment was due to misrepresentation of facts, and is subject to a 12% annual percentage rate interest charge on the unpaid balance.

15. At the time of the original Division hearing on June 1, 2009, the claimant was still awaiting employment authorization from the federal government.

16. While certifying his unemployment during his claim for the seventeen weeks ending February 21, 2009 through June 13, 2009, the claimant believed he was able and available for work. The claimant believed this because he was physically capable of work, he wanted to work, he needed to work to support himself and his family, and he was willing to make himself available for work but for his legal status regarding his work authorization from the federal government.

17. On June 23, 2009, the claimant was given an authorization stamp in his passport allowing a six-month employment authorization, valid from June 23, 2009 through December 22, 2009.

18. In late June 2009, the claimant returned to working.

19. On May 4, 2010, the Director at the Boston Field Office of the U.S. Citizenship and Immigration Services issued the claimant a letter stating, "Your Petition to Remove the Conditions on Residence has been ***GRANTED***. You are deemed to be a lawful permanent resident of the United States as of the date of your original admission of adjustment of status. Your Alien Registration Card will be mailed to you within 1 to 3 months."

# Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

*Authorized to work during the base period*

G.L. c. 151A, § 25, provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for ... (h) Any period, ... on the basis of services performed by an alien, unless such alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed ...

The issue before us is the claimant's work authorization status during the alternate base period of the claim, a period from April 1, 2008 through February 14, 2009. The findings reflect that the claimant had work authorization for July 12, 2007 through January 11, 2008, a period that terminated three months preceding the beginning of the claimant's alternate base period, and for June 23, 2009 through December 22, 2009, a period beginning four months following the end of the claimant's alternate base period.

The review examiner concluded that the claimant was not authorized to work during his alternate base period because he failed to show documentation that he was lawfully authorized to work in the United States while performing services during this time. Nonetheless, even if the claimant did not have a formal Employment Authorization Document during the period, the claimant was permanently residing in the United States under color of law (PRUCOL) and is, therefore, not disqualified from receiving benefits, under G.L. c. 151A, §25(h).

The Supreme Judicial Court has explained that an alien is in PRUCOL if the circumstances of the alien's presence suggest it is not temporary and, during the relevant time period, the United States Citizenship and Immigration Services (USCIS) has been aware of the alien's continued residence, could have deported the alien, but chose not to deport. Cruz v. Commissioner of Public Welfare, 395 Mass. 107, 115 (1985). These circumstances lead to the inference that USCIS has acquiesced in the alien's continued presence in the country. Id.

Finding # 2 states that the claimant came to the United States with a visa in March, 2004. Remand Exhibit # 8 shows that the claimant entered the United States on March 23, 2004, with a "K-1" fiancée visa, allowing the claimant to marry a United States citizen within 90 days.[1] *See* 8 U.S.C. § 1101(a)(15)(K)(i). Having resided in the United States since 2004 and having married a United States citizen, the claimant's presence in the United States is of a continuing and lasting nature.

Several of the exhibits show that the claimant was in regular contact with USCIS just prior to and following his alternate base period. Exhibit # 10 indicates that the claimant filed Form I-751, Petition to Remove Conditions on Residence, on April 20, 2007. Stamps within the claimant's visa in Exhibit # 3 and Remand Exhibit # 7 show that the claimant had received Conditional Residence status and that the claimant had Petitions to Remove Conditions on Residence pending with USCIS. Finding # 19 indicates that the claimant received a letter from USCIS, dated May 4, 2010, notifying the claimant that his Petition to Remove the Conditions on Residence had been granted and deeming the claimant to be a lawful permanent resident of the United States as of the date of the claimant's original admission of adjustment of status.

The combination of the claimant entering the United States with a valid "K-1" visa, his subsequent Conditional Residency status, the extensions of his Employment Authorization pending the Petition to Remove the Conditions on Residence, along with USCIS deeming the claimant a lawful permanent resident retroactively, satisfies us that USCIS was aware of and can be deemed to have acquiesced to the presence of the claimant. While USCIS could have proceeded to deport the claimant, there is no evidence of any activity toward that end. *See* Cruz, 395 Mass at 114-155.

We, therefore, conclude as a matter of law that the claimant has satisfied the eligibility requirement of G.L. c. 151A, § 25(h), as an alien who was permanently residing under color of law during while performing services during the base period.

*Able and available for work during the benefit year*

G.L. c. 151A, § 24(b), provides, in pertinent part, as follows:

> An individual, in order to be eligible for benefits under this chapter, shall ... (b) Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted....

The U.S. Department of Labor (DOL) regulations governing eligibility for unemployment insurance require that an alien must be legally authorized to work by the appropriate U.S. agency in order to be considered "available for work." Specifically, 20 CFR § 604.5—Application—availability for work, provides, in relevant part, as follows:

> (f) Alien status. **To be considered available for work in the United States for a week, the alien must be legally authorized to work that week in the United States by the appropriate agency of the United States government.** In determining whether an alien is legally authorized to work in the United States, the State must follow the requirements of section 1137(d) of the SSA (42 U.S.C. 1320b-7(d)), which relate to verification of and determination of an alien's status. (Emphasis added.)

Thus, in order to find the claimant available for work during the benefit year under G.L. c. 151A, § 24(b), the claimant must be legally authorized to work by the appropriate U.S. agency, currently the USCIS. In light of the finding that USCIS issued a six month work authorization to the claimant on June 23, 2009, the only benefit year period in controversy under G.L. c. 151A, § 24(b), is the period from the beginning of the claimant's benefit year, February 15, 2009, through June 22, 2009.

We can tell from the undisputed evidence in the record and immigration law that the USCIS granted the claimant work authorization during this four month benefit year period. Specifically, Remand Exhibit #6, the May 4, 2010 letter from USCIS granting claimant's Petition to Remove Conditions on Residence (Petition), "deemed [the claimant] to be a lawful permanent resident of the United States as of the date of [his] original admission of adjustment of status." In order for USCIS to have granted this Petition, the claimant and his spouse had to have timely filed this Petition within 90 days of the second anniversary of the date he was granted his original admission of adjustment of status. 8 C.F.R. § 216.4(a)(1). Exhibit #10 shows that the Petition[2] was filed on April 20, 2007. Relying on April 20, 2007, as approximately two years after the claimant was granted his original admission of adjustment of status, it is apparent that the claimant's original admission of adjustment of status was in 2005. Based upon this bestowal of USCIS work authorization retroactively, we are satisfied that the claimant was lawfully available for work during the benefit year.

We conclude as a matter of law that the claimant was entitled to benefits, under G.L. c. 151A, §§ 24(b) and 25(h).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending February 28, 2009, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF MAILING - January 6, 2011**

/s/

John A. King, Esq.
Chairman

/s/

Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**
**(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – January 5, 2011**
SBA/rh